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Before the
Federal Communications Commission
Washington, DC

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of)	MM Docket No. 93-107
)	
DAVID A. RINGER)	File No. BPH-911230MA
)	
ASF BROADCASTING CORP.)	File No. BPH-911230MB
)	
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC
)	
SHELLEE F. DAVIS)	File No. BPH-911231MA
)	
OHIO RADIO ASSOCIATES)	File No. BPH-911231MC

For Construction Permit for an
FM Station on Channel 280A in
Westerville, OH

DOCKET FILE COPY ORIGINAL

To: The Review Board

**REPLY TO MOTION TO FILE COMMENTS
OF OHIO RADIO ASSOCIATES**

Shellee F. Davis ("Davis"), by her attorney, hereby submits her Reply to the "Motion for Leave to File Comments" filed by Ohio Radio Associates ("ORA") on February 21, 1994. With respect thereto, the following is stated"

Background

1. On August 15, 1994, Davis filed a "Petition for Leave to Amend" to amend her transmitter site. Within that pleading, Davis provided information concerning the date on which she learned that the transmitter site that she previously designated had been sold, the steps taken to acquire a new site once permission from the new owner later was withdrawn, and evidence that she had reasonable assurance of her newly designated site. The Mass Media Bureau has supported acceptance of that amendment. "Mass Media Bureau's Comments on Petition for

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Leave to Amend" dated August 24, 1994. ORA opposed that Motion, claiming, to the Commission, in part, as follows:

In an amendment dated March 29, 1994, Davis reported that the tower site initially specified in her application had been sold. However, Davis never informed the Commission when the site was sold. **Because of the refusal of Davis to provide this essential information**, ORA conducted a search of the local land records. Attached hereto is a deed for the tower site in question, which is dated January 6, 1994. **See attachment 3. Accordingly, a substantial and material question of fact is raised that Davis knew of the sale before formally notified by the site owner on March 2, 1994.**

"Opposition to Davis Petition for Leave to Amend" filed on August 24, 1994 (emphasis added).

ORA also claimed:

The July 16, 1994, letter is defective in another respect. The tower site owner limits and conditions use of the site to a 5 kw transmitter. This is apparently because of the use of other transmitters at the site. **Davis proposes in her amendment the use of a 6 kw transmitter.**

Id. at 6 (emphasis added).

Argument

2. Both of those factual allegations, of course, were false, and Davis immediately informed ORA's counsel of that fact expeditiously, on October 4, 1994. Attachment 1. Rather than immediately inform the Commission of his error, both ORA and its counsel nothing for over four months. Even today, rather than withdraw the objectionable factual errors, ORA compounds the error by defending the statements.

3. With respect to the date on which Davis first learned of the sale of her originally designated site, Davis directly informed the Commission of the sale on March 29, 1994, and as she reported later in a Declaration submitted under penalty of perjury filed with her Petition on August 15, 1994:

I learned on or about March 7, 1994 that the site was sold. That information was first learned by me when I received the letter attached hereto as Attachment 1. I have never been told when the sale of the site was consummated, and at no time was I aware that a sale had occurred or was imminent prior to that date.

Petition at Exh. 2. Neither ORA nor any other applicant has submitted information which contradicts those factual assertions.

4. The law is that an applicant "need only obtain assurance 'sufficient...to justify...belief that the ... site [is] available and suitable until notified otherwise.'" Elijah Broadcasting Corp., 5 FCC Rcd 5350, 5351 ¶ 10 (1990) (emphasis added). Absent simultaneous "notice" to an applicant, the date on which a site is "sold" or "lost" by the land's owner or agent is not relevant. "Due diligence" is measured as of the date an applicant "is, or should have been apprised of the problem requiring amendment," e.g., when told that a site has been lost. Mabelton Broadcasting Co., 5 FCC Rcd 6314, 6321 ¶ 29 (Rev. Bd. 1990). More precisely, in past cases involving amendment of transmitter sites, "diligence" always has been measured from the date on which an applicant gains *actual* knowledge of the loss of its designated site (see Berea Broadcasting Co., 4 FCC Rcd 8813 (Rev. Bd. 1989); Mabelton Broadcasting, 4 FCC Rcd at 6320-21 ¶ 28), and no case ever cited by ORA ever has established or suggests otherwise. Davis fully abided by existing precedent by faithfully and accurately reporting that date to the Commission and acting in a diligent fashion thereafter. Contrary to ORA, at no time did ORA ever "refuse" to provide any "essential information" especially, since as Davis' counsel explained to ORA's counsel, "[s]he never was privy to that information, nor was she provided that information until [ORA] filed [its] pleading" (Attachment 1), and in any event, under Commission precedent, an applicant is not obligated to provide to the FCC that information

which it does not have. For ORA to cling to the position, to this day, even after being informed of the inaccuracy of its statements, that Davis "refused" to provide information or that "questions of fact" have been raised concerning when Davis learned of the sale, is incredible.¹

5. With respect to Davis' transmitter, the owner of the site has assured Davis:

space on the broadcasting tower...to accommodate a 2-3 bay FM antenna...and in one of the WOSU-TV transmitter buildings sufficient space to accommodate a five kilowatt transmitter and various related auxiliary equipment.

Attachment 2. Contrary to ORA's claims, although Davis has proposed to radiate 6 kW Effective Radiated Power ("ERP"), at no time did Davis "propose[] in her amendment the use of a 6 kw transmitter," and as Davis informed ORA previously, insofar as Davis will has proposed use of a three-bay antenna, she will not need a "6 kW transmitter." Attachment 1. In fact, as seen in Attachment 3 (and as ORA could have learned from its own Consulting Engineer before making its remarks originally), using a multi-bay antenna reduces the input power necessary for a transmitter, and in this case, by using a less-than-5 kW transmitter in conjunction with a 3-bay antenna, Davis is fully able to achieve its proposed operation while abiding by the space restrictions imposed upon it by its site owner. Again, ORA (1) misquoted

¹ ORA claims that it "requested" in its April 6, 1994 "Opposition to Motion for Leave to Amend" that Davis provide certain information concerning the date on which the site was sold. There is no such request. ORA (1) opposed acceptance of the amendment until Davis supplies certain additional information; (2) noted that Davis failed to disclose the date the tower site was sold; (3) noted that Davis failed to "disclose" when she first became aware that the site had been sold; and (4) claimed that such information is necessary to ascertain the existence of "due diligence."

ORA opposed the amendment and asked the Commission to require that the information be filed, but at no time has ORA asked Davis for the information -- it simply noted that Davis had not supplied the information.

facts, and (2) improperly raised arguments before the Board for which it had no actual factual support.

6. In short, ORA persists in its tactic of misstating the law and omitting or recharacterizing facts to fit what it apparently "wishes" were the facts or the law, rather than deal with the facts such as they actually exist. ORA's repeated failures to differentiate facts from its own (faulty) speculation, interpretation, or "[mis]characterization" is abusive, and constitutes a basic lack of respect for the Commission as an institution and a lack of candor. As the Court of Appeals has observed, although failure to inform the Commission of facts can at first be attributable to counsel rather than to the applicant, "[t]he client becomes fully responsible at some point, and that point is reached more quickly in practice before the FCC than in courts of law." RKO General, Inc., 670 F.2d 215, 231 (D.C. Cir. 1981). ORA's initial false statements, coupled with its intentional delay in correcting the information (as Davis' counsel had requested) or in clarifying the information (as ORA alternatively chose to do) should, at the very least, add further reason for the Board to view with deep suspicion the accuracy of the various factual and legal claims ORA has raised in other contexts already in this case.

WHEREFORE, it is foregoing Reply to the "Motion for Leave to File Comments" be considered by the Board.

Respectfully requested,

SHELLEE F. DAVIS

By: 

Dan J. Alpert

Her Attorney

The Law Office of Dan J. Alpert
1250 Connecticut Ave., N.W.
7th Floor
Washington, DC 20036

February 27, 1995

ATTACHMENT 1

MEMORANDUM

To: Stephen Yelverton, Esq.
From: Dan J. Alpert
Re: Opposition to Davis Petition for Leave to Amend
Date: October 4, 1994

This memo is to summarize and memorialize our conversation earlier today with regard to the "Opposition to Davis Petition for Leave to Amend" filed by you on behalf of Ohio Radio Associates on August 24, 1994.

First of all, you state in your pleading "...Davis never informed the Commission when the site was sold. Because of the refusal of Davis to provide this essential information, ORA conducted a search of the local land records."

-- To my knowledge, Davis was never asked, and therefore at no time has "refused" to provide any information concerning when the land was sold. She never was privy to that information, nor was she provided that information until you filed your pleading. Truth to tell, I think you meant to say "Because of the failure of Davis to provide to essential information..." She never "refused" anything, and to suggest (or as you did, state) otherwise is a misstatement.

Secondly, you state that "Davis proposes in her amendment the use of a 6 kW transmitter." I have checked, and the amendment does not contain a statement concerning what type or maximum output of transmitter would be required.

In fact, insofar as Davis has proposed use as a Jampro JSPC three-bay antenna, as you must know, there would be no need for Davis to use a "6 kW transmitter." [In fact, for your information, based upon our proposal, we would need substantially less than a 5 kW transmitter to accommodate the proposed directional 6 kW operation].

In line with Section 1.52 of the Commission's Rules, the Commission's policies with regard to party's obligation to correct factual inaccuracies, and the District of Columbia Canons of Professional Conduct, I expect that you will correct these factual errors expeditiously.

ATTACHMENT 2



The Ohio State University
Public Broadcasting Stations

WOSU-AM-FM-TV
2400 Orientangy River Road
Columbus, Ohio 43210-1027
Phone 614-292-9678

July 13, 1994

Shelley F. Davis
7030 Cloverdale Lane
Worthington, Ohio 43235

Dear Ms. Davis:

This letter will confirm our discussions concerning the availability of space on the broadcasting tower owned by WOSU-TV/The Ohio State University at 6680 State Route 3, in Delaware County, north of Westerville, Ohio, to accommodate a 2-3 bay FM antenna, and a 1-5/8 inch transmission line, and in one of the WOSU-TV transmitter buildings sufficient space to accommodate a 5 kilowatt transmitter and various related auxiliary equipment.

Space on the tower is currently being used by commercial broadcasters. Space to accommodate this project on the tower and in one of the buildings currently is available. Therefore, in the event you are willing to proceed, based upon present conditions, subject to the negotiation of a mutually-agreeable lease agreement, and in the event you are granted the construction permit for FM Channel 280A at Westerville, Ohio, by the Federal Communications Commission, we are willing to make available to you space upon the WOSU-TV tower and space in one of the WOSU-TV transmitter buildings sufficient to accommodate the equipment specified above. Based upon present loading of the tower, we would require that the antenna be mounted on the tower at a height so that the center of radiation would be no more than 500 feet above the ground. Although it may be a number of years before you obtain FCC authorization to build the station and begin operations, based upon present conditions, if the lease were entered into today, we are renting space on the tower for \$3.00 per foot per month, and floor space approximately the size of your need is being made available at a rate of \$200 per month. Costs for electric power would be billed extra, on an as-used basis. If the antenna proposed to be used were to be located 350 feet up on our tower, based upon present prices, the total monthly cost to you would be \$1,250 per month, plus costs for electricity.

Shellee F. Davis
July 13, 1994
Page 2 of 2

This is not a binding agreement, and can be revoked by either party at any time. Insofar as I understand that it is your intention to designate this site in an application to the Federal Communications Commission, I will attempt to keep you posted concerning the continued availability of tower space in the future.

Sincerely,



Dale K. Ouzts
General Manager

DKO/pjw

ATTACHMENT 3

Client SHELEE DAVISDate 8/30/94

FCC form _____ Sec. _____ Pg. _____

ENGINEERING STATEMENT
of
NORWOOD J. PATTERSON
re
TRANSMITTER POWER REQUIRED
BY FM PROPOSAL of SHELEE DAVIS

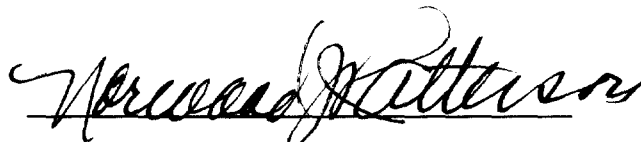
I, Norwood J. Patterson, am a radio, television and electronics consulting engineer, having studied at Pacific Radio School, San Mateo City College, San Francisco City College, and Stanford University. I have appeared on numerous occasions before the State Courts of the U.S., the Federal U.S. Courts, the Federal Communications Commission, and the U.S. Senate Hearing Committees. On all occasions I have been accepted as an Expert Witness in radio, television and electronics engineering matters.

I have been accepted by the Federal Communications Commission as an Expert in radio and television matters since 1947; am Grantee by the FCC of General Radio Telephone Certificate First Class since 1937 with present Certificate No. PG-11-25313, expiration date, LIFE.

I have been calculations of the transmitter R. F. output power required by Shelee Davis with an antenna height above ground of 102 meters and the horizontal run necessary to connect the transmitter to the antenna of 60 feet using the transmission line proposed of 1 5/8".

The transmitter power calculates to 4.9303 kW, which is within the continuous duty specifications of any 5 kW FCC type accepted transmitter.

I do hereby certify that I have prepared the enclosed data and, under penalty of perjury, that data of my own knowledge is correct. As to other information and belief, I believe that information to be true.



NORWOOD J. PATTERSON

Date 8-30-94

Client SHELEE DAVISDate 8/30/94FCC form 301 Sec. Pg.

RF SPECIALTIES
Prepared For: Shelee Davis

PROGRAM NO. ERP
Date: August 30, 1994

CALCULATION NUMBER 1

Transmitter Output:	4.9303 KW
Transmission Line:	Andrew LDF7-50A, 1-5/8 Inch
Length Of Line:	395 Feet
Line Efficiency At 103.9 mHz:	81.13%
Power Dissipated In Line:	930.30 Watts
Power At Input To Antenna:	4.0000 KW
Antenna Make/Model:	Jampro JSCP
Number of Bays:	Three
Polarization:	Circular
Max. Antenna Input Power Rating:	30 KW
Antenna Gain:	1.5
System E. R. P.:	6.0000 KW

CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that foregoing document was served on February 27, 1995 upon the following parties by First Class Mail, postage prepaid, or by Hand:

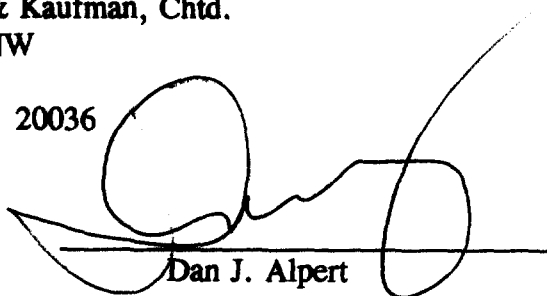
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Dan J. Alpert